United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Orig w/affidavit of mailing

76-1570

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1570

Bols

UNITED STATES OF AMERICA,
Appellant,

—against—

HENRY GOMEZ LONDONO,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
Of Counsel.

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Issue Presented

Whether the affidavit for the warrant issued on February 24, 1976, for the search of Londono's luggage was legally sufficient.

Preliminary Statement

The United States appeals, pursuant to T. 18 U.S.C. § 3731, from an order of the United States District Court for the Eastern District of New York (John F. Dooling, Jr., *J.*) entered on November 17, 1976, granting

the motion of appellee Henry Gomez Londono to suppress evidence (A. 173).[1] The evidence suppressed consisted, in pertinent part, of 1) certain statements made by Londono on February 22, 1976, to agents of the United States Customs Service; 2) approximately $10,000 in United States currency recovered from Londono's person on February 22, 1976; and 3) approximately $45,000 in United States currency and two .38 caliber revolvers found in Londono's luggage on February 24, 1976, by Customs agents executing a search warrant (A. 88-92).

Statement of Facts

A. The Stipulated Facts

By agreement of the parties, Judge Dooling ruled on the motion to suppress on the basis of the following stipulated facts (A. 37).

On February 21, 1976, agents of the Drug Enforcement Administration ("DEA") advised United States Customs agents that a reliable DEA informant in Colombia, South America, had furnished information that an individual known as Henry Gomez Londono would depart the New York area for Colombia, South America, sometime during the period between February 21, 1976, and February 25, 1976. Londono would be taking with him $100,000 in United States currency and would be going to Colombia in order to complete a narcotics transaction (A. 88). In December of 1975, the informant had provided the following description

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[1] References are to pages of Appellant's Appendix.

of Londono: date of birth—October 12, 1950; physical appearance—brown hair, thick lips, broad nose and square hair line. The informant had also stated that Londono would be carrying Colombian Passport No. 535124 (A. 88).

On February 21, 1976, agents of the Customs Service established a surveillance at the Avianca departure area in the Pan American World Airways terminal at John F. Kennedy International Airport. The surveillance continued on February 22, 1976, and at approximately 5:45 p.m. on that day, a Pan American employee advised the agents that an individual named Henry Gomez Londono was presently in the Avianca departure area (A. 88-89). The employee pointed out the individual to two plain-clothes Customs agents, who determined that the individual's appearance matched the description of the Henry Gomez Londono described by the DEA informant (A. 89). This individual, later identified as appellee Londono, was then stopped by the Customs agents as he proceeded towards the Avianca departure gate (A. 89).

When stopped, Londono had already surrendered his luggage to be checked on the flight and had received his baggage checks. However, he had not yet checked himself in as a passenger, and he had not surrendered the coupon covering the trip from New York to Colombia. The coupon would have been taken when he reached the desk of the departure gate for his flight, Avianca Flight 53 (A. 175).

After Londono was stopped, a uniformed Customs Inspector, Roberto Como, was brought over. Como identified himself to Londono and also identified the plain-clothes Customs agents as Agents Healey and

Annunziata (A. 89). Como was accompanied by a Pan American employee who acted as a Spanish interpreter (A. 89). Also present were two Port Authority policemen and another Pan American employee, although none of these individuals participated in the questioning of Londono. At the time, the two Port Authority officers were on their regular patrol assignment at the Pan American terminal (A. 89).

Through the interpreter, Agent Como advised Londono of the provisions of T. 31 U.S.C. § 1101(b); specifically, that Londono was required to fill out a report (Form 4790) declaring any money which he was taking out of the country in excess of $5,000. Londono was asked twice if he was taking out more than $5,000 (A. 89). When queried a second time, Londono stated that he had $900, and he showed to the Customs officers the cash which he had in his pockets. After he was asked a third time if he was carrying more than $5,000, Londono took an envelope from his jacket pocket and handed it to the agents, saying that he did not know what was inside the envelope (A. 90). Through an opening in the bulging envelope the agents observed something green. The envelope was then opened. Inside were found a photograph of Londono and $10,000 in $100.00 Federal Reserve Notes. Londono said that some people had asked him to deliver the envelope to Bogota, Colombia (A. 90).

At this point, Londono was placed under arrest, and his airline ticket, passport and baggage claim checks were taken from him (A. 90). Londono's luggage, which had already gone aboard the aircraft, was removed and taken to the International Arrival Building, along with Londono (A. 90). At the I.A.B., Londono was, for the first time, given his Miranda warnings through a Spanish interpreter (A. 90). On February 23, 1976, after

being lodged at the Metropolitan Correction Center overnight, Londono was brought before the United States Magistrate and charged with having violated T. 31 U.S.C. § 1101(b) and T. 18 U.S.C. § 1001 (A. 90).

The next day, February 24th, the magistrate issued a search warrant for Londono's luggage, which had been retrieved from the aircraft. The affidavit in support of the search warrant recited the facts substantially as set forth above. An added paragraph recited that a DEA agent had stated that the Special Agent in Charge of the DEA office in Bogota, Colombia, had advised the New York office by telephone from Colombia that the informant in the case had furnished highly reliable information in the past, but that, for security reasons, no further information could be supplied (A. 95-98). Upon execution of the warrant, the agents found, among other things, approximately $45,000 in United States currency and two loaded .38 caliber revolvers.

On March 2, 1976, Londono was charged in a three count indictment. Count One charged that he had knowingly and wilfully made a materially false, fraudulent and fictitious declaration to agents of the Customs Service with respect to the amount of money which he was carrying on his person and in his luggage when he was preparing to board Flight 53, in violation of T. 18 U.S.C. § 1001. Count Two alleged a violation of T. 31 U.S.C. § 1101(b), in that on February 22, 1976, Londono was wilfully transporting and causing to be transported via Avianca Flight 53 from New York to Colombia, South America, $44,780 in United States currency, having failed to file a report on Form 4790 as required by Section 1101(b) and 31 C.F.R. §§ 103.23(a) and 103.25(b). In Count Three, Londono was charged with having knowingly delivered to Avianca Flight 53 two .38 caliber firearms and ammunition, for concealed transportation to Colombia, South America, to persons other

than licensed importers, manufacturers, dealers or collectors, without written notice to Avianca that the firearms and ammunition were being transported and without turning the firearms over to the pilot, conductor or operator of the flight, all in violation of T. 18 U.S.C. § 922(e) (A. 4-5).

B. The ruling on the motion to suppress

Following his indictment, Londono moved to suppress all statements made by him and all evidence seized from his person and his luggage (A. 56). After considering the stipulated facts and after hearing argument on the motion, Judge Dooling granted the motion to suppress in all respects in his memorandum and order of November 17, 1976 (A. 173).

Judge Dooling determined first that the stipulated facts failed to establish a violation of T. 31 U.S.C. § 1101(b). The court reasoned that Londono's duty to file the Form 4790 report with respect to the currency which he was taking from the country "accrued" under 31 C.F.R. § 103.25(b) not earlier than "the time of departure." However, Londono never left the United States nor was the money itself ever transported outside of the country, and the currency reporting statute contains no attempt provision. Accordingly, since Londono had not progressed far enough down the road of departure, it was concluded that there had not been a violation of the 1101(b) reporting requirement (A. 184-186).

Having found that Londono had not violated the currency reporting statute, the court directed its attention to Count One of the indictment, the false statement charge. Judge Dooling began his analysis of the alleged 1001 violation by observing that "[f]or the Government to indict Gomez-Londono for the false answer to the oral interrogation it must show that the interrogation was

fair in the circumstances in which it was undertaken and in the light of the purpose of the statute [(meaning T. 31 U.S.C. § 1101(b))] which authorized the inquiry and required the answer." (A. 187).

Viewing the facts of the case from this standpoint, Judge Dooling stated that Londono's questioning by the agents "simply elicited a defensive reaction to the exigency of unexpected official questioning." (A. 187). The court found that this did not provide an adequate basis on which the Government could properly proceed to charge Londono with having made a 1001 material false statement:

> Gomez-Londono should have been tendered a Form 4790 and have been told that he was free to take as much United States currency out of the country as he wished, but that he was obliged to report the amount that he was taking and would then be free to depart with all of the money that he declared. So much was necessary to secure compliance with the Act [(meaning the currency reporting statute)] and to elicit a response on which the Government could proceed with propriety (A. 187-188).

Apparently having in mind the fact that he had already held that London had not violated Section 1101(b) of Title 31, Judge Dooling determined that "due process of law" requires that questioning which results in a false statement charge have as its expected or probable result "compliance with law and not the eliciting of a violation of law." (A. 188). The court then found that the questioning of Londono did not meet this standard because the agents who had questioned Londono had not "sought information for a statutory purpose in order to secure compliance with the law." (A. 188). Hence, the court determined, "the offense of Section 1001 was not committed." (A. 188).

Judge Dooling, however, did not order that Counts One and Two be dismissed; rather, he apparently relied on his findings with respect to those Counts in determining the validity of the warrant. Thus, he reasoned that although "the affidavit . . . is far more complete than is usually the case, . . . [n]o one was before the Magistrate to suggest the legal problems related to prosecutorial conduct which the very completeness of the affidavit might have disclosed to the Magistrate." (A. 189-190). Accordingly, the revolvers and other evidence from Londono's luggage were suppressed.

ARGUMENT

It Was Error For The District Court To Suppress The Evidence Recovered From Apellee Londono's Luggage.

The decision of the district court suppressing the evidence can be divided into three parts: *first*, the finding that there was no violation of the currency reporting statute; *second*, the determination that there was no 1001 violation; and *third*, the conclusion that the affidavit for the search warrant was defective as a matter of law.

On appeal, the United States does not challenge the first two of the court's rulings.[2] However, we do believe

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[2] We believe that Judge Dooling's conclusion with respect to the Section 1001 violation is erroneous. Since, however, the law in this area has never been clarified by the Supreme Court, although the law in this Circuit seems clear, *United States* v. *Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1968); *United States* v. *Corr*, — F.2d —, Slip op. 5904 (2d Cir., October 22, 1976), and since the Solicitor General does not believe that this case is an appropriate one to have the issue resolved should the case reach the Supreme Court, we are prepared to have this appeal resolved on the assumption that Section 1001 was not violated.

that Judge Dooling erred in suppressing the evidence found in Londono's luggage on February 24th. We submit that the firearms, currency and other items of evidence were seized by Customs agents who were executing a search warrant which had been properly issued by a United States Magistrate. We further contend that the affidavit submitted in support of the warrant showed more than enough probable cause and that it was not "insufficient in law." We begin our argument with the search itself.

A. The firearms and other evidence were in "plain view."

Assuming for the moment the validity of the warrant, it is plain that the money in the luggage was properly seized because it was specified in both the affidavit and the warrant as being the object of the search (A. 98-98a.) Similarly, the revolvers and other evidence recovered were discovered by the Customs agents as they conducted their search under the warrant. The seizure of these items was justified under the "plain view" doctrine, by which incriminating evidence inadvertently discovered during a search made pursuant to an initial lawful intrusion is subject to seizure. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-466 (1971). Here, assuming again for the moment the validity of the warrant, the initial intrusion was lawful because the agents were searching under a warrant. And the inadvertence requirement was met because there is no evidence to indicate that the searching officers "had prior knowledge of the [firearms and other evidence] or their location, nor of any intent to seize them prior to their discovery." *United States* v. *Rollins*, 522 F.2d 160, 166 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). See also *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 469-471.

If, then, the warrant for the search of the luggage was properly issued, Londono was not entitled to have the evidence recovered in that search suppressed. We will now turn to the warrant and its supporting affidavit.

B. The warrant was properly issued

1. The warrant for the search of Londono's luggage was issued under the authority of T.31 U.S.C. §1105, which provides for searches where there is probable cause to believe that monetary instruments are in the process of transportation and there has not been filed the Form 4790 report required under T. 31 U.S.C. § 1101(b). The statute reads in relevant part as follows:

> a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 1101 of this title has not been filed . . ., he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:
>
> (1) * * *
>
> (2) * * *
>
> (3) One or more designated or described letters, parcels, packages, or other physical objects.
>
> (4) * * *
>
> Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application . . .[3]

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[3] Cf. Rule 41, Federal Rules of Criminal Procedure.

Significantly, Section 1105 authorizes the issuance of a search warrant where there is probable cause to believe that "monetary instruments are in the process of transportation" and Form 4790 "has not been filed." The statute does not contain the requirement that before a warrant be issued a person have violated Section 1101(b). It is enough that the required report has not been completed. Here, we submit that the affidavit presented to the United States Magistrate contained more than enough probable cause to justify the issuance of a warrant under Section 1105. Hence, we believe that the warrant for the search of Londono's luggage was properly issued.

2. Agent Annunziato's affidavit is found at page 95 of appellant's appendix. In the affidavit, Annunziato recited the information from the informant which had been relayed to Customs by the DEA: specifically, that an individual named Henry Gomez Londono would depart the New York area for Colombia, South America, sometime during the period between February 21, 1976, and February 25, 1976. Londono would be taking with him $100,000 in United States currency and would be going to Colombia to complete a narcotics transaction (A. 96). The affidavit also recited the physical description which the informant had given of Londono (A. 96).

Annunziato then told of the surveillance on February 21st and 22nd at the Avianca Airlines departure area at the Pan American terminal at Kennedy Airport (A. 96). He also stated how on the 22nd he was told by a Pan American employee that there was an individual named Henry Gomez Londono in the Avianca departure area and how the appearance of this individual matched the description previously given by the informant (A. 96).

After reciting the fact that Londono was stopped and told that under section 1101(b) he was required to make a report if he was taking more than $5,000 out of the

country, the affidavit described Londono's acknowledgement that he was in possession of $900 in United States currency (A. 97). Annunziato then stated that when Londono was asked a second time if he had more than $5,000 and if he wanted to declare it, Londono exhibited the $900 in his possession and voluntarily showed to the agents an envelope containing $10,000 in United States currency, saying that he did not know what was in the envelope (A. 97). Thereupon, the affidavit stated, Londono was arrested and his luggage taken from the aircraft and secured in the Customs security area (A. 97).

In a final paragraph in the affidavit, Annunziato stated that he had spoken with a DEA agent who had talked to Octavia Gonzalez, the DEA Agent in charge in Bogota, Colombia. Gonzalez had stated that the informant was a "highly reliable source" who had furnished "highly reliable information in the past." (A. 98). For security reasons, however, Gonzalez declined to furnish over the telephone from Colombia the details concerning the informant's reliability (A. 98).

We fail to see how it can be argued that Agent Annunziato's affidavit did not set forth probable cause for the issuance of a warrant under T. 31 U.S.C. § 1105. Indeed, as Judge Dooling himself conceded, "[t]he affidavit in support of the warrant of attachment is far more complete than is usually the case, and it cannot but have pursuaded the Magistrate that the occasion was a most proper one for the issuance of a warrant." (A. 189).

3. Having established, then, we submit, that the affidavit set forth sufficient probable cause, it follows that the warrant for the search of Londono's luggage was validly issued. Hence, the currency, firearms and other items of evidence were properly seized when the agents conducted their search. Thus, we confess that we are at

a loss to understand the basis for Judge Dooling's suppression of the evidence from the luggage search. The court's reference to "prosecutorial conduct" and the statement that the affidavit was "insufficient in law" are hardly illuminating. Nevertheless, they do tend to point to information in the affidavit as being the cause of the court's concern. Accordingly, it is to this area which we have directed our attention.

Assuming that Judge Dooling believed that the affidavit was facially sufficient to establish probable cause, the only ground upon which he could have determined that it was "insufficient in law" was by concluding that information in the affidavit was improperly obtained. We respectfully submit that to the extent Judge Dooing so concluded he was in error. Such a conclusion is supported neither by law nor the facts of this case.

We begin by noting that the focus of the inquiry must be upon paragraphs 7, 8 and 9 of the affidavit, for the other statements presented by Agent Annunziato—paragraphs 1 through 6 and 10—are all based on either information from the informant or independent observation and investigation by the agents.

Paragraphs 7, 8 and 9 recite Londono's evasive responses to the agents' questions as to the money he was carrying. They also describe the recovery from Londono of the $10,000 and his baggage checks and the taking of his luggage from the aircraft. We submit that the only conceivable objection which could be raised to the inclusion of these paragraphs in the affidavit is the claim that somehow they were tainted as being the "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 484, 487-488 (1963). Indeed, appellee Londono made essentially just this argument in the district court. There, it was contended that the statements given by Londono, as set forth in the affidavit, were improperly obtained because Londono was not given the warnings required under

Miranda v. *Arizona*, 384 U.S. 436 (1966). However, Judge Dooling, and we believe correctly, rejected Londono's *Miranda* argument. As a factual matter, the court found that Londono was not the subject of custodial interrogation—the prerequisite for a viable *Miranda* claim—when he made the statements (A. 181-184). See *Beckwith* v. *United States*, — U.S. —, 96 S. Ct. 1612 (1976).[4]

We must conclude, then, that the sole basis for Judge Dooling's holding that the affidavit was "insufficient in law" was his determination that Londono was not guilty of violating the currency reporting statute and that he did not violate T. 18 U.S.C. § 1001. We respectfully submit that this ruling must be rejected as error.

We have not challenged on appeal the court's holdings with respect to Counts One and Two of the indictment. Nevertheless, even assuming *arguendo* that Londono was not guilty of violating Section 1101(b) and that he did not make a false statement within the meaning of T.18 U.S.C. §1001, it hardly follows, as Judge Dooling has apparently concluded, that statements and evidence legally obtained from him could not be used in the affidavit for the search warrant.

To begin with, as noted above, Section 1105 of Title 31 authorizes the issuance of a warrant where there is probable cause to believe that monetary instruments are in the process of transportation and the required report

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[4] The concluding paragraph of Judge Dooling's order does direct the suppression of appellee's statements and the money recovered from him on February 22, 1976. We are at a loss to understand the basis for that holding. The district court has no power, absent a constitutional violation, to suppress otherwise voluntary statements. T. 18 U.S.C. § 3501. *United States* v. *DiGilio*, 538 F.2d 972, 985 (3d Cir., 1976); *United States* v. *Crook*, 502 F.2d 1378, 1381 (3d Cir., 1974); *cf. United States* v. *Jacobs*, — F.2d —, Slip op. 1187 (2d Cir. December 30, 1976).

has not been filed. As already seen, the statute says nothing about a person having to have first been found guilty of violating Section 1101(b) before a warrant can be issued. Just as importantly, however, when the Customs agents approached Londono and questioned him, they were acting well within the scope of their duties in the context of Section 1101(b) and the related regulations, 31 C.F.R. §§ 103.23(a) and 103.25(b). Indeed, Judge Dooling himself determined "that where there is a duty to answer, there is no privilege to lie, and, in the present case, there was an unqualified duty to answer a fairly put inquiry and a duty to answer it truthfully." (A. 184) See *Bryson* v. *United States*, 396 U.S. 64, 72-73 (1969); *United States* v. *Chevoor*, 526 F.2d 178, 182 (1st Cir. 1975), *cert. denied*, — U.S. —, 96 S. Ct. 1665 (1976). Put most simply, the record in this case fails to provide any basis for concluding that the information in the Annunziato affidavit was improperly obtained or that the affidavit was "insufficient in law."

In conclusion, then, we respectfully submit that Judge Dooling erred in granting the motion to suppress. The affidavit submitted by Agent Annunziato was more than sufficient in establishing probable cause for the issuance of the warrant. Consequently, the currency, firearms and other evidence found during the execution of the warrant were properly seized.[5]

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[5] As a final point, we continue to believe, as we argued in *United States* v. *Karathanos*, 531 F.2d 26 (2d Cir), *cert. denied*, — U.S. —, 96 S.Ct. 3221 (1976), that the harsh sanction of the exclusionary rule is totally inappropriate in a case such as this. As we contended in *Karathanos*, once authorization for the search has been obtained in good faith from a neutral and detached magistrate, and there is a defect in procedure resulting from an error of judgment on the part of the magistrate, the application of the exclusionary rule serves no deterrent function with respect to the conduct of law enforcement officers and should be eschewed. See *Stone* v. *Powell*, — U.S. —, 96 S.Ct. 3037, 3054-3055, 3072, concurring opinion of Chief Justice Berger and dissenting opinion of Justice White.

CONCLUSION

The order of the district court suppressing the evidence should be reversed.

Dated: January 17, 1977

Respectfully submitted,

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United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Joanne Bracco being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of January 1977 he served a copy of the within

~~Brief for Appellant~~

by placing the same in a properly postpaid franked envelope addressed to:

Ivan Fisher
410 Park Avenue
~~New York, N.Y. 10022~~

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this
20th day of January 1977

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4613298
Qualified in Kings County
Term Expires March 30, 1977